IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1484

JAMES ZURCHER, et al.,
Petitioners

vs.

THE STANFORD DAILY, et al.,
Respondents

No. 76-1600

LOUIS P. BERGNA, et al.,
Petitioners

vs.

THE STANFORD DAILY, et al.,
Respondents

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE SUBMITTED BY THE STATES OF ALABAMA, ALASKA, CALIFORNIA, GEORGIA, IDAHO, ILLINOIS, INDIANA, MARYLAND, MASSACHUSETTS, MISSISSIPPI, NEBRASKA, NEW HAMPSHIRE, NEW MEXICO, OREGON, PENNSYLVANIA, UTAH AND VIRGINIA.

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This case raises important questions involving the Fourth Amendment and every state's search warrant statutes and rules. In addition the case substantially impairs the immunity from money damages under 42 U.S.C. section 1983 of prosecuting attorneys at both trial and appellate levels. Amici, as the attorneys general of their respective states, have a direct interest in the resolution of these issues.

SUMMARY OF ARGUMENT

Amici argue that a prohibition on the use of search warrants against third parties absent an attempt to use a subpoena duces tecum is without support in the Fourth Amendment. It is also inconsistent with the statutory authority for obtaining and serving warrants in the states, and could greatly reduce the efficiency of the states in enforcing their laws. The fact that a student newspaper was involved in the case does not compel a different result.

Amici also submit that an award of attorney's fees against prosecuting attorneys violates their absolute immunity against money damages under section 1983. In addition, retroactive application of the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2640 is fundamentally unfair to the prosecutors.

ARGUMENT

I

PROHIBITING THE USE OF SEARCH WARRANTS FOR THIRD PARTIES IS NOT REQUIRED BY THE FOURTH AMENDMENT, IS INCONSISTENT WITH THE SEARCH WARRANT PROVISIONS OF ALL FIFTY STATES, AND UNDERMINES THE ABILITY OF THE STATES EFFECTIVELY TO ENFORCE THEIR LAW.

The district court below left no doubt as to its holding on the question of third-party searches: "law enforcement agencies cannot obtain a warrant to conduct a third-party search unless the magistrate has probable cause to believe that a subpoena duces tecum is impractical." *Stanford Daily v. Zurcher* (N. D. Cal. 1972) 353 F.Supp. 124, 132 adopted on appeal, 550 F.2d 464 (9th Cir. 1977).[1] Any search in violation of this rule is "unreasonable per se, and therefore violative of the Fourth Amendment." *Id.* at 127. Amici submit that this holding is not required by the Fourth Amendment,[2] and will have a devastating effect on local law enforcement should it be approved by this court.

The purpose of the Fourth Amendment is to protect against "searches under indiscriminate, general authority." *Warden v. Hayden* (1967) 387 U.S. 294,

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[1]This case involves a student newspaper, but the First Amendment issues discussed in the opinion below are clearly secondary to the major holding set out above. See 353 F.Supp. at 133-135. The secondary issues are discussed later.

[2]This position was taken by the Sixth Circuit in its rejection of the *Zurcher* holding. *United States v. Mfrs. Nat'l Bank of Detroit, Livernois-Lyndon Street, Safety Deposit Box No. 127, Detroit, Michigan* (6th Cir. 1976) 536 F.2d 699, 702-703, *cert. denied*, 429 U.S. 1039.

301. Thus the amendment's central concern "is to protect liberty and privacy from arbitrary and oppressive interference by government officials." *United States v. Ortiz* (1975) 422 U.S. 891, 895. This objective has been achieved by the requirement that a neutral and detached magistrate make the determination whether a search warrant should be issued. *Johnson v. United States* (1948) 333 U.S. 10, 13-14.

The Fourth Amendment states clearly the only requirements for a warrant: ". . . probable cause . . . particularly describing the place to be searched, and the persons or things to be seized." To include the limitation that only "defendants" may be searched with a warrant, as proposed by the court below, is to ignore this Court's admonition to read the Fourth Amendment's "practical" commands in a common sense manner. *United States v. Ventresca* (1965) 380 U.S. 102, 108. By obtaining a search warrant the police insure that the privacy rights of the individual (regardless of whether the person is a defendant, suspect, or third party) are protected. By protecting those rights, the purposes of the Fourth Amendment are achieved. *See Richardson v. State of Maryland* (D. Md. 1975) 398 F.Supp. 425, 429, n. 5. Further procedures are neither necessary nor desirable.

The district court was puzzled by the paucity of authority on this issue. 353 F.Supp. at 127-128. The reason is not, as the district court suggested, that law enforcement agents routinely use the subpoena duces tecum. To the contrary, amici know of no state where law enforcement routinely attempts to obtain

a subpoena in those circumstances. Rather the laws of every state assume the reasonableness of third-party searches.

A review of the various statutory authorizations for search warrants reveals that all states permit property described in the warrant to be seized wherever it is found,[3] or provides for the seizure of any evidence tending to show that a felony has been committed or that a particular person has committed it.[4] The emphasis in each of these statutes is not on the status of the person in whose possession the property may be, but rather it is on the property itself, with consideration for its physical location and its usefulness to the police in proving a crime. These statutes ensure that *every* person is equally guaranteed the protections of the Fourth Amendment. The district court's opinion, if allowed to stand, will effectively invalidate the search warrant provisions of all these states, thus seriously undermining the ability of the states to conduct criminal investigations.

This court recognized in *Fuentes v. Shevin* (1972) 407 U.S. 67, 93, n. 30 that the search warrant serves "a highly important government need—*e.g.*, the apprehension and conviction of criminals. . . ." Even

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[3]*See, e.g.*, ALA. CODE tit. 15, § 199; ALASKA STAT. § 12.35.025; CAL. PEN. CODE § 1524 (West); GA. CODE ANN. § 27-303; IDAHO CODE § 19-4402; IND. CODE ANN. § 35-1-6-1 (Burns); MASS. GEN. LAWS ANN. ch. 276, § 1; MD. ANN. CODE art. 27, § 551; MISS. CODE ANN. § 99-27-15.

[4]*See, e.g.*, CAL. PEN. CODE § 1524 (West); ILL. ANN. STAT. ch. 38, § 108-3 (Smith-Hurd); NEB. REV. STAT. § 29-813; N.H. REV. STAT. ANN. § 595-A:1; N.M. STAT. ANN. § 41-23-17 (Rule 17); OR. REV. STAT. § 133.535; PENN. RULES OF CRIM. PROC. Rule 2002; VA. CODE § 19.2-53.

assuming *arguendo* (as did the district court) that a subpoena could be as easily and quickly obtained as a search warrant,[5] a subpoena fails to provide the assurances inherent in the warrant process that evidence will not be lost or destroyed.

When a warrant is served, the police seize the described property or evidence and remove it from the premises, precluding the defendant, his associates, his sympathizers, or just the clumsy from tampering with it. The subpoena system set out by the district court requires the police to first ask the third person to turn over the property, thus greatly increasing the opportunity for a suspect either to destroy it or to threaten the person who has it. "The danger is all too obvious that a criminal will destroy or hide evidence or fruits of his crime if given prior notice." *Fuentes, supra.* The criminal will obviously have increased opportunities to tamper under the subpoena/contempt system contemplated by the district court. Though the district court proposed use of contempt proceedings for failure to turn over evidence or the issuance of a restraining order [353 F.Supp. at 133], these procedures will be of little value if the evidence is destroyed, or if the person in whose custody the evidence is ignores, or is prevented from complying with, the restraining order. Though that individual might be jailed for contempt of court or violation of

[5] "[A] search warrant is generally issued in situations demanding prompt action." *Fuentes, supra.* The subpoena-contempt-restraining order procedure proposed below could greatly lengthen the time necessary to obtain evidence, thus slowing investigations and potentially prejudicing suspects who might be cleared by the seized material.

the restraining order, ironically the defendant could go free for lack of sufficient evidence to obtain a conviction.

The district court also concluded that because a student newspaper was the third party in possession of the evidence, First Amendment considerations were present which required the use of a subpoena rather than a warrant, basing its conclusion on *Branzburg v. Hayes* (1972) 408 U.S. 665. See 353 F.Supp. at 133-135. Though it is true that *Branzburg* contains language on the importance of a newsman's sources (408 U.S. at 681-682), the case also makes clear that the First Amendment does not invalidate every incidental burdening of the press that might occur when civil or criminal statutes of general applicability are enforced. 408 U.S. at 682. In *Branzburg* this Court held that a newsman had no First Amendment privilege to refuse to testify before a grand jury about crimes which he saw a source commit. *Id.* at 697. The absence of any attempt at harassment and a compelling interest in law enforcement through grand jury investigations combined to authorize such inquiries. *Id.* at 700. A similar holding is appropriate here. The state has an equally compelling interest in having these photographs of criminal activity brought to light, and use of a warrant, signed by a neutral, detached magistrate insures that the search is not done merely to harass the newspaper. The search in this case was valid under *Branzburg.*[6]

[6] Assuming *arguendo* that *Branzburg* does require different procedures when news agencies are the subject of a search war-

In *Stone v. Powell* (1976) 428 U.S. 465, 490 this Court made the following observation with respect to the exclusionary rule:

> "The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice."

An even greater disparity and windfall will accrue to defendants should the district court's opinion become constitutionally compelled. Amici respectfully submit that the disruption of legitimate, constitutionally permissible law enforcement techniques throughout the country mandates reversal of this case.

II

AN AWARD OF ATTORNEY'S FEES AGAINST PROSECUTORS VIOLATES THEIR ABSOLUTE IMMUNITY FROM MONEY DAMAGES UNDER 42 U.S.C. SECTION 1983.

The Ninth Circuit Court of Appeals affirmed an award of attorney's fees against prosecuting attorneys

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rant, amici submit that this Court has already established adequate protections in *United States v. 37 Photographs* (1973) 402 U.S. 363 and *Heller v. New York* (1973) 413 U.S. 483. These cases held that First Amendment concerns with respect to allegedly obscene materials were ensured by a prompt adversary hearing after the seizure. A similar requirement that materials seized from a news agency under a warrant must be quickly reviewed in an adversary hearing to ensure their relevance to a criminal proceeding and that no First Amendment interests are imperiled will suffice to meet the concerns voiced by the court below.

and police officers by retroactively applying the Civil Rights Attorney's Fees Awards Act of 1976 (the Act), 90 Stat. 2640 (October 19, 1976). *Stanford Daily v. Zurcher, supra,* 550 F.2d at 465-466. Amici submit that the granting of attorney's fees violates the prosecutor's immunity against money damages.

This Court has clearly established an absolute immunity from money damages under 42 U.S.C. section 1983 for prosecuting attorneys "in initiating a prosecution and in presenting the State's case. . . ." *Imbler v. Pachtman* (1976) 424 U.S. 409, 431. In reaching this conclusion the Court emphasized the need to ensure that a prosecutor's energies are not deflected from his public duties, and his decisions are not shaded by consideration of possible future litigation. 424 U.S. at 423.

> "The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." 424 U.S. at 424-425.

An award of attorney's fees seriously erodes the prosecutor's absolute immunity and has the potential for ever greater harm.

Regardless of whether attorney's fees are denominated damages or costs, the effect of such an award is to render the prosecutor liable for an amount of money charged against him due to his performance of some official duty. In many cases the attorney's fees are in excess of the sum of damages. The prosecutor is thus confronted with the need to consider

whether his actions might result, at some future time, in civil rights litigation and exposure to attorney's fees. This abrogates the purpose behind this Court's grant of immunity in *Imbler*. Prosecutors will be hampered in exercising their "best judgment both in deciding which suits to bring and in conducting them in court." *Imbler* at 424.

Moreover, an award of attorney's fees poses even greater problems from the standpoint of its effect on a prosecutor's performance of his duties than does an award of damages. In its decision granting attorney's fees, the district court in this case specifically found that a good faith defense was no bar to the award of such fees. *Stanford Daily v. Zurcher* (N.D. Cal. 1973) 366 F.Supp. 18, 25.[7] The theory presented was a shifting of the financial burden of litigation, rather than punishment of the persons charged with the fees. As a result prosecuting attorneys who cannot be sued at all, "even when their acts are alleged to be malicious" [*Harris v. Harvey* (E.D. Wis. 1976) 419 F.Supp. 30, 31], can be forced to pay attorney's fees for the good faith performance of their job. Such a result is particularly untoward and unfair in a case such as this, where the prosecutor met his constitutional and statutory obligations and obtained an opinion from a neutral, detached magistrate that the search proposed was fully proper. Nevertheless this careful and conscientious prosecutor must pay attorney's fees because another judge decided, on an en-

[7]The Ninth Circuit did not deal with this issue, but merely upheld the award by application of the Act.

tirely new interpretation of the Fourth Amendment, that the first judge should not have issued the warrant. The impact of this decision is manifest. Not only has the prosecutor lost a considerable portion of the immunity granted by *Imbler*, he has no defense to the imposition of damages in the guise of attorney's fees, and is the insurer of judicial error.[8]

The district court attempted to minimize this argument by noting that in California the public entity would pay any fees under that state's statutory scheme of indemnification. 366 F.Supp. at 25-26. But the decision by a state to provide indemnification for its employees is irrelevant. The crucial question is, does a federal court have the jurisdiction to make the attorney's fees award, and then order that a state entity pay it.

A state entity may not be sued directly since it is not a person under section 1983. *Monroe v. Pape* (1961) 365 U.S. 167; *Moor v. County of Alameda* (1973) 411 U.S. 693.[9] It cannot ever be a party and thus is at least as immune as is the prosecuting attorney. Since the employer is immune, a federal court

[8]Police officers are placed in an equally untenable situation by the decision below. The officers here were obligated to serve the search warrant, duly issued by a magistrate and not defective on its face. Refusal could result in the loss of their jobs or contempt of court citations. By serving it, however, they now face the possibility of an award of damages in the form of attorney's fees against them, for which they have no defense.

[9]Congress did not change this rule when it passed the attorney's fees act. Legislation has recently been introduced to include state government units in the definition of persons under section 1983 (H.R. 4514, introduced March 4, 1977), a step that would be unnecessary if the Act overruled or modified *Monroe* and *Moor*.

cannot order that the government entity pay an award of attorney's fees. The fact that a state has chosen to indemnify its employees in other contexts and with other objectives in mind does not compel a different conclusion.

The existence of indemnification does not authorize a court to make an otherwise improper award of money merely because there is a fund available to pay that award. The logic of the district court would prohibit an attorney's fees award against prosecuting attorneys in states without indemnification, while permitting it in states with indemnification, a clearly inequitable result.[10] Amici submit that the Act can never be used to authorize an award of attorney's fees against prosecutors, since the attorney should never be liable, and the government entity which would pay the award cannot be sued at all.

Should this Court decide, however, that the Act does permit attorney's fees awards in cases such as this, amici submit that it is inappropriate to do so retroactively. Though it appears that Congress intended the Act to apply to all cases pending on the date of enactment (550 F.2d at 466), consideration

[10]Amici note that indemnification of public employees is not universally accepted by the states. Indeed, a survey conducted by the American Correctional Association in 1977 found that seventeen states have no provisions for indemnification. R. Crane and G. Roberts, *Legal Representation and Financial Indemnification for State Employees: A Study* (January, 1977) (American Corrections Association). A chart prepared for the study which sets out the states and their indemnification provisions is reproduced as Appendix A to this brief. The fact that some states have adopted such a procedure should not authorize a federal court to impose that obligation on other states.

should still be given to the factors set out by this Court in *Bradley v. Richmond School Board* (1974) 416 U.S. 696, 717-718 (cited in the House report, 550 F.2d at 466): the nature and identity of the parties, the nature of their rights, and the nature of the impact of the change in law on those rights. All of these factors are applicable in this case, and as a result the municipality and the prosecutor are unfairly and unjustly precluded from protecting themselves from an award of attorney's fees on a theory not available at the time of the incident, or when the award was made. Amici submit that the Ninth Circuit erred in applying the attorney's fees act retroactively.

CONCLUSION

For the foregoing reasons amici respectfully submit that the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

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November 15, 1977.

(Appendix A Follows)

APPENDIX

APPENDIX A

State	Legal Assistance	Indemnification	Comments
Alabama	Yes	No	
Alaska	Yes	Yes	Limit: $100,000,000.
Arizona	Yes	No	
Arkansas	Yes	No	
California	Yes	Yes	Punitive damages not covered
Colorado	Yes	Yes	Covers tort and §1983
Connecticut	Yes	Yes	Immunity law
Delaware	Yes	No	Bills in drafting stage
Florida	Yes	Yes	
Georgia	Yes	No	
Hawaii	Yes	No	Provided by collective bargaining agreement
Idaho	Yes	Yes	
Illinois	Yes		
Indiana	Yes	No	
Iowa	Yes	Yes	Bill passed in 1975
Kansas	Yes	No	
Kentucky	Yes	No	
Louisiana	Yes	Yes	Indemnification limited to §1983 actions
Maine	Yes	Yes	Ad hoc determination
Maryland	Yes	No	But may apply to Board of Public Works for help
Massachusetts	Yes	Yes	Limited to $10,000
Michigan	Yes	Yes	Not required to indemnify
Minnesota	Yes	No	Limited to tort actions
Mississippi	Yes	No	
Missouri	Yes	Yes	Limited to $100,000
Montana	Yes	Yes	
Nebraska	Yes	Yes	Ad hoc determination
Nevada	Yes	Yes	
New Hampshire	Yes	Yes	Broad protection given
New Jersey	Yes	Yes	No punitive damages
New Mexico	Yes	Yes	
New York	Yes	Yes	
North Carolina	Yes	Yes	Limited to $30,000
North Dakota	Yes	Yes	Bonding fund
Ohio	Yes	No	

APPENDIX A (continued)

State	Legal Assistance	Indemnification	Comments
Oklahoma	Yes	No	Limited to civil and civil rights actions
Oregon	Yes	Yes	
Pennsylvania	Yes	Yes	Legal help usually not provided in criminal cases
Rhode Island	Yes	Yes	Decided on case by case basis
South Carolina	Yes	Yes	Limited to $350,000
South Dakota	Yes	No	Provides up to $3,000 for legal assistance
Tennessee	Yes	No	
Texas	Yes	Yes	Bill enacted in 1975
Utah	Yes	Yes	
Vermont	Yes	Yes	Indemnification limited to $100,000 and discretionary
Virginia	Yes	Yes	
Washington	Yes	Yes	
West Virginia	Yes	No	
Wisconsin	Yes	Yes	Indemnification limited to $100,000
Wyoming	Yes	Yes	Limited to $250,000
Canada	Yes	Yes	